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AFFIN BANK BHD

v.

EDARAN HALAMAN SDN BHD & ORS

B

HIGH COURT MALAYA, IPOH
BALIA YUSOF WAHI J
[CIVIL SUIT NO: 22-188-01]
29 DECEMBER 2005

C ***CIVIL PROCEDURE:*** *Summary judgment - Application for - Rules of the High Court 1980, O. 14 - Whether there were triable issues raised - Whether there was reasonable bona fide defence*

This was an appeal against the decision of the registrar dismissing the plaintiff's application for summary judgment under O. 14 of the Rules of the High Court 1980. The plaintiff brought an action against the four defendants jointly and severally for the recovery of a sum totaling RM3,795,000 being the amount guaranteed by the second, third and fourth defendants on a loan taken by the first defendant. Judgment in default of appearance was obtained against the first and fourth defendants while the third defendant had been declared a bankrupt. In the application for summary judgment, the plaintiff bank filed encl. 18 against the second defendant (the respondent in the case herein). In support of the application, the plaintiff filed two supporting affidavits in encls. 19 and 21 while the second defendant filed his affidavit in reply *via* encl. 20. The application was fully disposed of by the registrar whereby it was refused, hence this appeal. The plaintiff's claim against the second defendant was premised on the guarantee given by the latter *vide* a letter of guarantee. On the failure of the borrower to maintain his loan account with the plaintiff, a notice of demand was issued to the second defendant. The plaintiff also produced exh. AGMM 5A in encl. 19 which was a statement of account in respect of the indebtedness referred to in cl. 11 of the letter of guarantee. In reply to the application, the second defendant denied everything that had been pleaded. The second defendant further contended in the alternative that the amount claimed was excessive, unconscionable, not equitable and therefore illegal. As to the letter of guarantee, the second defendant claimed that it was unenforceable and contrary to the law. He further argued on the issue of negligence of the receivers and managers appointed for the borrower company.

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Held (allowing the appeal):

[1] The assertion or rather the denial of the second defendant was not only lacking in precision but was also inconsistent with the undisputed contemporary documents produced in support of the application for the O. 14 procedure. The assertion made by the second defendant was inherently improbable in the light of the facts disclosed and thus rendered the issues raised as not triable. As to the challenge on the amount claimed, it would not be sufficient for a guarantor to merely say that the amount claimed was excessive and illegal. (paras 4 & 16)

[2] A perusal of the defence indicated that it was essentially a denial of the claim. The second defendant's affidavit in reply (encl. 20) contained averments by the second defendant claiming no knowledge about the loan transaction between the borrower and the bank and alleging that the letter of guarantee was illegal. These statements were inconsistent with the documents produced and the set of facts established. The said affidavit did not contain any evidence which the second defendant must show in order for this court to allow him leave to defend. (para 17)

[3] The second defendant had failed to give good reasons to question the accuracy of the plaintiff's certificate issued under cl. 11 of the letter of guarantee. The averments of the second defendant in challenging the amount guaranteed by him were inconsistent with the contemporary documents produced and exhibited in support of this application and lacking in precision and had therefore failed to raise a triable issue. The second defendant did not show that he had a good defence to the claim or that there was a dispute as to the facts which ought to be tried or any other circumstances showing a reasonable *bona fide* defence. (para 19)

[4] The issue of negligence on the part of the plaintiff in appointing the managers and receivers for the borrower company was not a triable issue when considered with the terms in the letter of guarantee and the relevant case laws. Similarly the issue of whether or not there was negligence on the part of the receivers and managers in dealing with the

affairs of the borrower company was not a triable issue in the application for summary judgment under O. 14 before this court. (para 19)

[5] The application for summary judgment was filed on 10 July 2002 while the defence of the second defendant was filed on 5 November 2001. On the issue of delay in filing the application, the plaintiff stated in encl. 19 that there were some communications between the second defendant and the plaintiff's credit control division resulting in temporary suspension of action taken or proposed to be taken against the second defendant as a guarantor. This fact was never challenged by the second defendant and remained uncontroverted. The delay was found to be reasonable and was not such as to inhibit the power of this court to grant the order. (paras 20 & 23)

[Plaintiff given leave to sign final judgment against second defendant in terms of encl. 18.]

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 ***(refd)***

Amanah Merchant Bank v. Sumikin Bussan Kaisha Ltd [1992] 4 CLJ 2241; [1992] 2 CLJ (Rep) 59 HC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Doric Development Sdn Bhd & Ors [1988] 1 MLJ 462 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Chen Hong Ping v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***

Ho Lai Ying & Anor v. Cempaka Finance Bhd [2004] 1 CLJ 232 CA ***(refd)***

Hou Heng Oil Co (M) Sdn Bhd v. Tan Tiew Yong [1987] 1 MLJ 139 ***(refd)***

Kok Siah Poo v. Perkayuan OKS Sdn Bhd [1989] 3 MLJ 164 ***(refd)***

Krishnamurthy & Anor v. Malayan Finance Corp Bhd [1986] 2 MLJ 134 ***(refd)***

Loo Sze Kin v. Cheong Choy Teik [1997] 4 MLJ 537 ***(refd)***

Majlis Agama Islam Negeri Johor v. United Merchant Finance Bhd [1995] 4 MLJ 482 ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***

Marine Sports Ltd v. Alliance Richfield Pte Ltd [1990] 3 MLJ 5 ***(refd)***

Ng Hee Thoong v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Oriental Bank Bhd v. Jaafar Sidek Mohd Salim & Ors [1990] 2 CLJ 72; [1990] 2 CLJ (Rep) 585 HC ***(refd)***
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82 HC ***(refd)***
Societie Des Etains De Bayas Tadjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267 ***(refd)***
Syn Lee & Co Ltd v. Bank of China [1961] MLJ 87 ***(refd)***
Universiti Kebangsaan Malaysia v. Zainal Abidin Ahmad & Anor [1988] 2 MLJ 303 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiff - CH Cheng; M/s Tay, Ibrahim & Partners
For the 2nd defendant - Abdul Malik; M/s Kas & Abdul Malik

Reported by Suhainah Wahiduddin

JUDGMENT

Balia Yusof Wahi J:

[1] This is an appeal against the decision of the learned registrar dismissing the plaintiff's application for summary judgment under O. 14 of the Rules of High Court 1980. The plaintiff brought an action against the four defendants jointly and severally for the recovery of a sum totalling RM3,795,000 being the amount guaranteed by the second, third and fourth defendants on a loan taken by the first defendant, one Edaran Halaman Sdn. Bhd. The writ of summons was filed on 26 September 2001. Judgment in default of appearance was obtained against the first defendant on 12 November 2001 (encl. 5), against the fourth defendant on 19 March 2002 (encl. 11) while the third defendant has been declared a bankrupt. In the course of his submission, learned counsel for the plaintiff did indicate to the court that a similar judgment in default of appearance has also been obtained against the third defendant but I fail to find any evidence of that and likewise counsel did not go any further than stating that fact.

[2] In the application for summary judgment, the plaintiff bank filed encl. 18 against the second defendant who is the respondent in the present case before me. The application was filed on 10 July 2002 and a date for hearing was fixed on 4 September 2002. In support of the application, the plaintiff filed two supporting

affidavits in encls. 19 and 21 while the second defendant filed his affidavit in reply *via* encl. 20. The application was fully disposed off by the learned registrar on 12 May 2003 whereby it was refused and hence this appeal.

[3] As noted earlier, the plaintiff's claim against the second defendant is premised on the guarantee given by the second defendant together with two others *vide* letter of guarantee dated 1 October 1996. On the failure of the borrower to maintain his loan account with the plaintiff, notice of demand was issued and also a statement of account was sent to the second defendant. At the same time a copy of the judgment in default of appearance against the borrower was also sent to the second defendant. These documents are annexed as exhibits to the plaintiff's affidavit in support of its application in encl. 19. It is to be further noted that the application for summary judgment was filed on 10 July 2002 while the defence of the second defendant was filed on 5 November 2001. The plaintiff intimated that the delay in filing it's application for summary judgment was because of the second defendant's request made to the Bahagian Kredit Pengawalan-Pengawasan dan Pemulihan to suspend the case against him temporarily in order for him to find a suitable purchaser of the borrower's land that is charged to the plaintiff. Exhibits "AGMM 6A" and "AGMM 6B" in encl. 19 are clear testimonies to this fact.

[4] In reply to the application, the second defendant stated that he has a good defence, that the amount demanded by the plaintiff has not accrued, that the plaintiff has varied the terms of the agreement with the borrower without informing him and getting his consent as a guarantor. The second defendant further claims that he has no knowledge about exh. 'AGMM1' in the plaintiff's affidavit which is the letter of offer for the loan facilities granted to the borrower. As to the letter of guarantee, the second defendant claims that it is unenforceable and contrary to law. He further denies receiving the notice of demand from the plaintiff and at the same time claims that the figure in the said notice (exh. AGMM 4A in encl. 19) is wrong, excessive and states that his liability is only up to the amount of RM412,000 only. The second defendant's other argument centred on the issue of negligence of the receivers and managers appointed for the borrower company.

[5] For a start let it be stressed again that an appeal against the order made under O. 14 of the Rules of The High Court 1980 is by way of a rehearing. As such, for all intents and purposes, I am hearing the application as if it is coming before the court for the very first time. It has been stated in *Kok Siah Poo v. Perkayuan OKS Sdn. Bhd.* [1989] 3 MLJ 164 that:

> The approach to be taken by an appellate Court in an Order 14 appeal has been settled. The appellate Court should not regard the appeal as reviewing exercise of the judge's observation but should approach the appeal as rehearing. This principle was reiterated in *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* which referred to *National Company For Foreign Trade v. Kayu Raya Sdn. Bhd.* [1984] 2 MLJ 300 following *European Asian Bank v. Punjab & Sind Bank* [1983] 2 All ER 508 at page 516.

[6] To be entitled to a summary judgment, this court will have to be satisfied that the respondent has not raised any *bone fide* triable issues. This was the approach taken by Thompson CJ in *Syn Lee & Co. Ltd v. Bank of China* [1961] MLJ 87. At p. 87, His Lordship stated:

> With great respect is seems to me there may have been some slight misapprehension on the part of the registrar and on the part of the trial judge as to the proper approach. It is not quite the same as the problem with which are being faced in the chancery side of the court of trying issues on affidavit evidence. In a case of this sort, it is not a case of trying the issues on affidavit evidence, it is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed.
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> On the other hand, we have to remember that the order is there as much in the interest of defendants as in the interests of plaintiffs. It is in the interest of plaintiffs, that they should be able to get prompt judgment when there is no real defence. But, on the other hand, it is in the interest of defendants, in such cases that plaintiffs should be able to get judgments not only expeditiously but economically.

[7] The same has been stated by Hashim Yeop A Sani SCJ in *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182, that eminent judge explained:

> The underlying philosophy in the Order 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

[8] As to the scope of the applicability of the rule, the Supreme Court has stated that summary judgment procedure is limited to virtually uncontested or uncontestable cases. Gunn Chit Tuan SCJ in *Bank Negara Malaysia v. Mohd. Ismail & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 has stated in his judgment:

> The scope of Order 14 proceedings meant for cases which are virtually uncontested or uncontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a *bone fide* defence, he ought to have leave to defend. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases (See *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] 2 MLJ 183, *Gunung Bayu Sdn. Bhd. v. Syarikat Pembinaan Perlis Sdn. Bhd.* [1987] 2 MLJ 332.) It was held in the well known House of Lords' case of *Jacobs v. Booths Distillery Co.* [1901] 85 LT 262 that a complete defence need not be shown. The defence need only show that there is a triable issue or question or that for some other reason there ought to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given (*Manger v. Cash* [1889] 5 TLR 271.)

[9] In the said case, Mohd. Azmi SCJ in a well written judgment expressing the majority view of the court laid down the following principle as a guide to judges in dealing with an application under O. 14. His Lordship stated:

> In our view, basic to the application of all those legal propositions, is the requirement under Order 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v. Letchumanan* had this to say at p. 217:

Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Although Lord Diplock was dealing with an application for removal of caveat in the particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.

Under an Order 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an Order 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under Order 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v. Casey* and *European Asian Bank AG v. Punjab & Sind Bank* at page 516.)

[10] A further word of caution was offered by Yong Pung How J in *Marine Sports Ltd. v. Alliance Richfield Pte. Ltd* [1990] 3 MLJ 5 in deciding O. 14 application when His Lordship noted that:

This being an Order 14 application, it is not for the court to decide on the final merits of the issue, but only to provide an opportunity for the defendants to put up a defence if the court is satisfied that there is an issue which should be tried.

[11] And finally, perhaps I should also refer to a passage in the judgment of VC George J in the in the case of *Amanah Merchant Bank v. Sumikin Bussan Kaisha Ltd.* [1992] 4 CLJ 2241; [1992] 2 CLJ (Rep) 59 where it has been reiterated that O. 14 should not be granted when any serious conflict of the facts or any real difficulty on a matter of law arises. But however difficult the point of law is, once it is understood and the court is satisfied that it is really unarguable, it would give final judgment.

[12] So much on the law and basic principles of O. 14 application, and I shall now deal with the facts and the nature of the application before me. The plaintiff's claim against the second defendant is based on the guarantee and cl. 11 of the same relates to certificate of indebtedness issued by the plaintiff. For ease of reference, cl. 11 of the letter of guarantee states as follows:

> Any admission or acknowledgment in writing by the customer or any person authorised by the customer of the amount of indebtedness of the customer to you and judgment recovered by you against the customer in respect of such indebtedness shall be binding and conclusive against me/us. A statement signed by your manager, sub-manager, secretary or any one of your officers as to the money and liabilities for the time being due or incurred to you from or by the customer shall be final and conclusive evidence against me/us for all purposes including legal proceedings.

[13] It is settled law that a guarantor is only liable under a guarantee if the principal debtor is in default and becomes liable to the creditor. The onus is on the creditor to show default has taken place. In the absence of such default by the debtor, a guarantor cannot be rendered liable under the guarantee. (*Universiti Kebangsaan Malaysia v. Zainal Abidin b. Ahmad & Anor* [1988] 2 MLJ 303.)

[14] A default judgment has been obtained against the debtor in the instant case and a copy of the judgment is exhibited in the affidavit of the plaintiff filed in support of the application. Notices of demand were sent to the debtor as well as all the guarantors preceding the legal action against them (exhs. AGMM 4A in encl. 19). The plaintiff has further produced exh. AGMM 5A in encl. 19 which is a statement of account in respect of the indebtedness referred to in cl. 11 of the letter of guarantee. It appears to me that there are two limbs to the abovementioned cl. 11. Firstly an

admission or acknowledgement in writing by the customer and any judgment against the customer is binding and conclusive against the guarantor. Secondly a statement signed by the manager, sub-manager, secretary or any one of the officers of the bank, which is commonly known as the certificate of indebtedness, shall be final and conclusive evidence against the guarantors.

[15] Raja Azlan Shah a (Malaya) (as His Majesty then was) delivering the judgment of the Federal Court in *Citibank N.A. v. Ooi Boon Leong & Ors* [1981] 1 MLJ 282 at p. 283 said:

> That brings us to the important question whether the Assistant Registrar was entitled to deal with the case under the RSC Order 14 procedure. We have often said in this court many a time that where all the issues are clear and the matter of substance can be decided once and for all without going to trial there is no reason why the Assistant Registrar or the judge in chambers, or for that matter this court, shall not deal with the whole matter under the RSC Order 14 procedure. In the present case the guarantee contains a clause which entitles the bank by producing a certificate of indebtedness by its officer to dispose with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus "A certificate by an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives." It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate. See *Dobbs v. National Bank of Australasia Ltd.* [1935] 53 CLR, 643, *Bache & Co. v. Banque Vernes* [1973] 2 Lloyds' Rep. 437. In the circumstances, the respondents are bound under Clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for.
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> If further authorities are sought for, the following cases will provide illustrations which echo a similar statement namely; *Standard Chartered Bank v. Boomland Development Sdn. Bhd.* [1977] 4 AMR 3442, *Perwira Habib Bank Malaysia Bhd v. Fast Travel (M) Sdn. Bhd.* [1988] 3 MLJ 210, *D & C Nomura Merchant Bankers Ltd v. Gunung Kuari Sdn. Bhd. & Ors* [1990] 2 CLJ 58, *Development and Commercial Bank Bhd. v. Datuk Krishna Kumar Sharma* [1988] 2 CLJ 453, *MBF Finance Bhd v. Hasmat Properties Sdn. Bhd. & Ors* [1990] 1 MLJ 180, *Oriental Bank Bhd. v. Jaafar Sidek b. Mohd Salim & Ors* [1990] 2 CLH 72.

[16] In opposing the application for the O. 14 procedure, the second defendant filed an affidavit in reply (encl. 20) and restated the pleadings he filed in his defence which in essence I find it to be a mere denial. The second defendant denies everything that has been pleaded by the appellant in para 1 to 5 of the statement of claim which means that there was no such transaction whatsoever between him, the bank and the principal debtor/borrower. The second defendant further contends in the alternative that the amount claimed is excessive, unconscionable, not equitable and therefore illegal. Considering the facts and circumstances of the case before me, I am impelled to conclude that the assertion or rather the denial of the second defendant is not only lacking in precision but is also inconsistent with the undisputed contemporary documents produced in support of the application for the O. 14 procedure. I further find that that the assertion made by the respondent is inherently improbable in the light of the facts disclosed and thus rendering the issues raised as not triable. (See *Bank Negara Malaysia v. Mohd. Ismail & Ors (supra)*). As to the challenge on the amount claimed, it is trite that it would not be sufficient for a guarantor to merely say that the amount claimed is excessive and illegal and requiring the plaintiff to put it to strict proof. Peh Swee Chin J (as he then was) in *Bank Bumiputra Malaysia Bhd. v. Doric Development Sdn. Bhd & 2 Ors* [1988] 1 MLJ 462 on the argument that no account for the money due was supplied, and the bank was therefore put to strict proof thereof observed at p. 463:

> The short answer was that by clause 6 of the relevant letter of guarantee, any amount stated by the bank and duly certified by any of the bank's officers would have to be treated by the guarantor as conclusive. The affidavit of the bank's manager (enclosure 8), stating the sum with interest thereon, would be within clause 6 aforesaid. Quite apart from clause 6, it would not be sufficient for the guarantor to merely say that the account was not supplied and that the bank would therefore be put to strict proof, for such account could always have been obtained on request to the bank or from the company, and putting merely the bank to strict proof would not amount to a condescension on particulars by the guarantor when showing cause to an Order 14 application, as after all by averring that the plaintiff be put to strict proof would only amount to a mere denial.

[17] In his affidavit in reply (encl. 20) the second defendant averred that he has a good defence to the claim and exhibited his statement of defence therein. As I have stated earlier, a perusal of the defence indicates that it is essentially a denial of the claim. The affidavit merely relied on the defence pleaded which consists of mere denials. The said affidavit also contains averments by the second defendant claiming no knowledge about the loan transaction between the borrower and the bank and alleging that the letter of guarantee is illegal. These statements are inconsistent with the documents produced and the set of facts established. In my view these are all mere denials. The affidavit does not contain any evidence which the second defendant must show in order for this court to allow him leave to defend. Denials in a defence do not constitute evidence. They are challenges to the other side to show proof. (See: *Chen Hong Ping v. Intradagang Merchant Bankers (M) Bhd.* [1995] 3 CLJ 690).

[18] In the course of his submission, the learned counsel for the second defendant relied on the case of *Ho Lai Ying & Anor v. Cempaka Finance Bhd.* [2004] 1 CLJ 232 to support his argument that the plaintiff has failed to show the exact amount claimed and the mere production of the certificate of indebtedness is insufficient to prove the plaintiff's claim. In that case, the appellants in their affidavit in opposition had challenged the correctness of exh. P3, the certificate of indebtedness and there were no other documents which the court could rely on other than that exh. P3 and two other agreements namely the loan agreement and the guarantee agreement. The position is quite different from the present case before me. Besides the certificate of indebtedness and the guarantee agreement, there were a list of other exhibits enclosed in the affidavit of the plaintiff in encl. 19 namely the letter of demand, a copy of the judgment and letters indicating communication between the plaintiff and the second defendant as to the state of affairs relating to the claim filed by the plaintiff against the second defendant. In any event, once again I must stress that the case of the second defendant in this suit is one of a denial and alternatively he is claiming that the sum claimed is excessive. That in my view is insufficient to cast any doubt on the certificate. On these grounds, I find that the case of Ho Lai Ying is clearly distinguishable. In my considered opinion, in the absence of fraud or manifest error on the certificate of indebtedness or the statement of the manager of the bank as to the amount due and/or owing to the bank, it shall be conclusive. Of course a plaintiff

should not be allowed to hide behind the conclusive evidence clause and make unlawful claims against a guarantor. The court must in the first place be satisfied with the certificate itself. As Siti Normah J (as her ladyship then was) held in *Oriental Bank Bhd. v. Jaafar Sidek b. Mohd. Salim & Ors.* [1990] 2 CLJ 72; [1990] 2 CLJ (Rep) 585:

> For the clause to operate against the defendants, the plaintiff must first establish that any certificate it issues on the first defendant's indebtedness can be accepted as correct and I consider that this is a condition precedent which must be fulfilled by the plaintiff. In this case, the defendants have given me good reasons to question the accuracy of the plaintiff's certificate issued under clause 19, and under such circumstances I consider that the certificate can no longer be regarded as being conclusive as evidence against the defendants in these proceedings.

[19] The second defendant has not offered any evidence to challenge the correctness of the certificate other than saying that the claim is excessive in the alternative to his denial of the letter of guarantee which is the main thrust of his defence. Borrowing the words of Siti Normah J in the abovementioned case, the second defendant has failed to give me good reasons to question the accuracy of the plaintiff's certificate issued under cl. 11 of the letter of guarantee. The only specific averment of the second defendant in challenging the amount guaranteed by him is stated in para. 16 and 17 of encl. 20. These averments are in my view inconsistent with the contemporary documents produced and exhibited in support of this application and lacking in precision and has therefore failed to raise a triable issue. As gathered from the pleadings and the affidavit evidence, I have come to the conclusion that the second defendant has failed to show that he has a good defence to the claim or that there is a dispute as to the facts which ought to be tried or any other circumstances showing a reasonable *bona fide* defence. The issue of negligence on the part of the plaintiff in appointing the managers and receivers for the borrower company is not a triable issue when considered with the terms in the letter of guarantee and the relevant case laws. Similarly the issue of whether or not there was negligence on the part of the receivers and managers in dealing with the affairs of the borrower company is not a triable issue in the application for summary judgment under O. 14 before this court.

[20] Finally on the issue of delay, the plaintiff thought it fit that this issue ought to be explained although the respondent made no objection or any submission at all on the subject matter. The application for the O. 14 procedure was filed on 10 July 2002 well after the filing of the defence by the second defendant on 5 November 2001, a period of over eight months. To account for this delay, the plaintiff stated in encl. 19 that there were some communications between the second defendant and the plaintiff's Credit Control Division resulting in temporary suspension of action taken or proposed to be taken against the second defendant as a guarantor. Exhibits AGMM 6A and 6B in encl. 19 were referred to in support of this fact as averred by the plaintiff in para. 12 of the affidavit in support of the application. This fact is never challenged by the second defendant and remains uncontroverted. It is settled law that in the evaluation of affidavit evidence where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission of the fact so stated: *Ng Hee Thoong v. Public Bank Bhd.* [1995] 1 CLJ 609, *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 MLJ 382; *Overseas Investment Pte. Ltd. v. Anthony William O' Brien & Anor* [1988] 2 CLJ 238; [1988] 2 CLJ (Rep) 82.

[21] The effect of delay in putting an application for summary judgment was considered in *Societie Des Etains De Bayas Tadjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267 where Abdoolcader J at p. 268 said:

> The writ in these proceedings was issued on 8 July 1977, and served on 29 July on the defendants who filed their defence and counter claim on 12 August raising several points of defence and counter claim, but the plaintiff only took out their application for summary judgment for the full amount of their claim on 16 August. In *Mc Lardy v. Slateum* [1890] 24 QBD, 504 the Divisional Court held that, though it was the intention of the rules that the application should be made before a defence had been delivered in ordinary course, the plaintiff was not precluded from making it afterwards, but in such an event the onus is cast on the plaintiff of showing why he did not apply sooner. The plaintiffs in this case have not discharged this onus and indeed counsel appearing for them admitted this to be so.

[22] (For further reference see also *Hou Heng Oil Co. (M) Sdn. Bhd. v. Tang Tiew Yong* [1987] 1 MLJ 139, *Majlis Agama Islam Negeri Johor v. United Merchant Finance Bhd* [1995] 4 MLJ 482, *Loo Sze Kin v. Cheong Choy Teik* [1997] 4 MLJ 537, *Krishnamurthy & Anor v. Malayan Finance Corp. Bhd.* [1986] 2 MLJ 134).

[23] The onus is on the plaintiff to explain the delay that has occurred in this case and he has done so. Having considered the matter, I accept the explanation of the plaintiff on the delay in filing the application and on the facts and circumstances presented before me, I also find the delay to be reasonable. The delay in this case was not such as to inhibit the power of this court to grant the order.

[24] Having considered the issues raised, in all the circumstances of this case, I therefore allow the appeal with costs. The plaintiff is given leave to sign final judgment against the second defendant in the terms of encl. 18.